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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellants*

v.

ROBERT D. MURGIA, *Appellee*

Brief Amici Curiae of the Older and Middle Age Worker Ombudsman Pilot Project of United Communities of Southeastern Philadelphia and of the Public Interest Law Center of Philadelphia In Support of Appellee

On Appeal from the United States District Court for the District of Massachusetts.

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U.S. Bureau of the Census, *1970 Census of Housing and Population, Census Tracts, Philadelphia, Pa. S.M.S.A.*, Table P-1 (Washington: U.S.G.P.O. 1972) 2

U.S. Bureau of the Census, *16th Census of the United States: 1940, Population*, Vol. IV, Part IV, Pennsylvania Table 24 (Washington: U.S.G.P.O. 1943) 2

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U.S. Bureau of the Census, *16th Census of the United States, Population and Housing, Statistics for Census Tracts*, Philadelphia, Pa. Table 2 (Washington: U.S.G.P.O. 1942) 2

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v.

ROBERT D. MURGIA, *Appellee*

BRIEF AMICI CURIAE OF THE OLDER AND MIDDLE AGE WORKER OMBUDSMAN PILOT PROJECT OF UNITED COMMUNITIES OF SOUTHEASTERN PHILADELPHIA AND OF THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA IN SUPPORT OF APPELLEE

On Appeal from the United States District Court for the District of Massachusetts

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CONSENT TO FILING

This amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties to the case.

INTERESTS OF AMICI CURIAE

The Older and Middle Age Worker Ombudsman Pilot Project was organized in March, 1975, by United Communities of Southeast Philadelphia, with a grant from discretionary monies available under the federal Comprehensive Employment and Training Act to the Governor of the Commonwealth of Pennsylvania and its Department of Labor and Industry. United Communities is an association of five historic settlement houses serving ethnically diverse and aging neighborhoods along the Delaware River in Southeast Philadelphia. In 1940, for example, the 174,000 people of this part of the City had a median age of 26.5 years, and 23% of them were aged forty-five or over. By the 1970 Census, the median age of the 108,000 people living in the neighborhoods had increased to 31.6, and 36% of them were over forty-five. In 1940, 48% of the people over forty-five years of age in Philadelphia were in the labor force; by 1970, that figure had increased to 50.3%.[1]

In 1975, the recession aggravated the distress which unemployment imposes upon aging citizens, and United Communities founded the Older and Middle Age Workers Ombudsman Pilot Project to provide employment counseling and pension advice and to seek a wider distribution of jobs to the aging. In particular the Project seeks, wherever the Constitution and statute law extends, to eliminate discrimination in employment on grounds of age. The Project has counseled and represented individual aging citizens in these pursuits, and, because the lower court

1. U.S. Bureau of the Census, *16th Census of the United States: 1940, Population*, Vol. IV, Part IV, Pennsylvania Table 24, at p. 301 (Washington: U.S.G.P.O. 1943); *16th Census of the United States, Population and Housing, Statistics for Census Tracts, Philadelphia, Pa. Table 2* (Washington: U.S.G.P.O. 1942); *1970 Census of Housing and Population, Census Tracts, Philadelphia, Pa. S.M.S.A.*, Table P-1 (Washington: U.S.G.P.O. 1972); *Census of Population: 1970*, extract from Fourth Count Tape, prepared by Philadelphia City Planning Commission (1973).

in this case properly found the mandatory retirement of a fifty year old man unreasonable and invidious under the Constitution, the Project files this amicus brief to urge that the decision be affirmed.

The Public Interest Law Center of Philadelphia, a non-profit private corporation, was created in July, 1974, by the Philadelphia Bar Association in recognition of the Bar's obligation to provide counsel to unrepresented citizens in matters which significantly affect the public interest. In particular the Law Center provides representation in matters which cut across economic barriers and touch upon the interests of a broad sweep of the citizenry. Matters affecting the aging are among these as are matters affecting employment generally and the availability of jobs.

The Law Center has counseled the Older and Middle Age Worker Ombudsman Pilot Project and provided legal representation to individual aging citizens in employment cases. The Law Center, and its predecessor, the Philadelphia office of the Lawyers' Committee for Civil Rights Under Law, has also litigated several score race, sex, and national origin employment discrimination cases under Title VII of the Civil Rights Act of 1964, and is exploring the responsibilities of federal contractors under Section 503 of the Rehabilitation Act of 1973 to take affirmative action to employ the mentally and physically handicapped. Because the district court in this case properly required that continued employment be determined on a performance standard, undistorted by stereotype or thoughtlessness, the Law Center files this brief amicus curiae to urge that the decision be affirmed.

STATUTORY PROVISIONS INVOLVED

Massachusetts General Laws Ch. 32, Section 26(3) which is entitled "Retirement Upon Attaining Age Fifty-five or Expiration of Twenty Years of Service for Physical

or Mental Incapacity" (Michie 1973), provides in subsection a, in the part whose constitutionality is here in issue, as follows:

> Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

The text of the statute is found at page 492 of Annotated Laws of Massachusetts, Ch. 32, §26(3)(a) (Michie 1973).

Massachusetts General Laws, Ch. 32, §26(2), Ch. 32, §6(1), and Ch. 22, §9(A)(Michie 1973) also affect the issue here. Chapter 32, §26(2) (Michie 1973), entitled "Retirement for Physical or Mental Incapacity Caused by Illness or Injury Incurred in Performance of Duty," provides in subpart (a):

> (2) Retirement for Physical or Mental Incapacity Caused by Illness or Injury Incurred in Performance of Duty.-(a) Any member in service classified in Group 3 who is an officer of the division of state police in the department of public safety shall be retired by the state board of retirement in case the rating board, after an examination of such officer by a registered physician appointed by it, shall report in writing to the state board of retirement that such officer is physically or mentally incapacitated for the performance of duty by reason of (i), illness incurred through no fault of his own in the actual performance of duty, or (ii), an injury resulting from an accident occurring during the performance and within the scope of his duty and without contributory negligence on his part, and that such incapacity is likely to be permanent.

Chapter 32, §6(1) (Michie 1973), entitled "Ordinary Disability Retirement-Conditions for Allowance," provides:

> Any member in service who becomes totally and permanently incapacitated for further duty before attaining age fifty-five and after completing fifteen or more years of creditable service, or any such member who is a veteran as defined in section one who becomes totally and permanently incapacitated for further duty before attaining the maximum age for his group and after completing ten or more years of creditable service, upon his written application on a prescribed form filed with the board or upon such an application by the head of his department after a hearing, if requested, as provided for in subdivision (1) of section sixteen and subject to the conditions set forth in said section and in this section, shall be retired for ordinary disability as of a date which shall be specified in such application and which shall be not less than fifteen days nor more than four months after the filing of such application but in no event later than the maximum age for his group nor earlier than the last day for which he received regular compensation. No such retirement shall be allowed unless the board, after such proof as it may require, including in any event an examination by the medical panel provided for in subdivision (3) of this section and including a certification of such incapacity by a majority of the physicians on such medical panel, shall find that such member is mentally or physically incapacitated for further duty, that such incapacity is likely to be permanent, and that he should be so retired.

Finally, Chapter 22, §9(A) (Michie 1973), entitled "Division of State Police, Additional Appointments, etc.," provides in part:

No officer appointed under this section shall be denied re-enlistment if he has served satisfactorily for six years or more; provided that he has passed such physical examination as is prescribed by rules and regulations hereunder.

QUESTION PRESENTED

Whether a state employment scheme providing continuing individualized tests of performance and capability, which tests are shown by the evidence to be reliable and which are in fact relied upon by defendant Commonwealth for every other employment decision, may, consistent with the Fourteenth Amendment, involuntarily retire a capable state policeman merely because he has become fifty years of age?

STATEMENT OF THE CASE

Massachusetts' statute imposing retirement at the age of fifty—a unique statute among the several states, in fixing upon the age fifty—was held unconstitutional by the district court on a record which describes in extensive detail both the continuous screening, testing, review and evaluation operations of Massachusetts which are focused upon the performance capabilities of its state policemen and the particular capability of the plaintiff, Lt. Col. Murgia. The full factual background of the case is set out in the opinion of the court below[2] and in Brief for Appellees. In brief, the facts are as follows.

Plaintiff was involuntarily retired from the Massachusetts State Police because he became age fifty on July 23, 1972. At the time of his forced retirement, plaintiff "was in excellent physical health and capable of performing the duties of a state police officer, whether involving physical or psychological stress." (Op. 754) He was possessed of the "high versatility" required and was in no way even "partially superannuated" (Op. 754). These were the findings of the District Court and, indeed, the court below observed that testimony on these facts was "undisputed" (Op. 754).

The process of continued testing and scrutiny of a state policeman's performance and capabilities, upon which the findings as to plaintiff were based, is focused upon each policeman from the time of his recruitment until the end of his career. Entrance requirements are rigorous. A state policeman first serves two three-year probationary periods. Only after six years' service is he entitled to re-enlistment, and then only if "he has served satisfactorily" and if he "has passed such physical examination as is prescribed by the rules. . . ." Massachusetts General Law, Chapter 22, §9(A) (Michie 1973). The same

2. The opinion of the three-judge District Court for the District of Massachusetts is reported at 376 F.Supp. 753 (hereinafter cited as "Op.").

physical examination given to the young recruit on enlistment and re-enlistment is given to state policemen as they age, with the same high standard of fitness, agility, strength, health and self-possession being required of the older policemen. (Appendix 35, 49) Until a state policeman is forty, he must pass the examination every two years; after he is forty, he must successfully submit his capabilities to the examination annually. (Op. 754) These are the systematic mechanisms relied upon by Massachusetts to assure the performance capability of each of its state policemen. If any policeman fails to meet those requirements he is denied re-enlistment or given a disability retirement. Massachusetts General Law, Ch. 32, §26(2), Ch. 32, §6(1) and Ch. 22, §9(A) (Michie 1973).

The criteria for continued employment are tough and thorough, and periodically and individually applied. As the District Court found, in Massachusetts' system "[i]ndividual testing . . . is . . . the order of the day." (Op. 755) Massachusetts uniquely departs from the systematic individual determination of a state policeman's physical and mental capacity, when the policeman becomes fifty years old.

The record reveals no medical or psychological basis for such departure. Indeed, the record indicates that there is more variation in the ability of members of the same age group to perform satisfactorily as state policemen than there is between state policemen of differing ages. Massachusetts' intense individual screening processes to secure as state policemen workers capable of the job are themselves proof of the fact. In no other state has a statute fixed compulsory retirement at age fifty. Massachusetts' own data on disability discharges and the incidence of disability waivers (Op. 756) show a declining curve, not an ascending one, as state policemen approach age fifty, suggesting the efficacy and the reliability of Massachusetts' individual screening systems so arbitrarily cut off at age fifty.

Massachusetts set the age for compulsory retirement of state policemen at fifty in 1939, when longevity and work

life were shorter, the period of family responsibilities peaked earlier, and the host of other measures of vitality were not so well developed. In 1920, for example, ten years after Massachusetts' mandatory retirement scheme was established, the expected life span was 54 years; in 1940, one year after fifty was set by Massachusetts as the mandatory retirement age for state policemen, expected life span was 63 years; in 1972, expected life span was 71.[3] Despite these intervening changes and the absence of any evidence supporting maintenance of the standard of another generation, Massachusetts' mandatory retirement of its state policemen upon age fifty remains unaltered.

3. Figures are derived from Table 80 of the *Statistical Abstract of the United States* (1974).

ARGUMENT

Age Is Not Reasonably Linked with Mental or Physical Capability to Perform a Job, Let Alone Irrebuttably Linked.

Only in modern times have societies been so dominated by the stereotyped association of aging with incompetence to perform valued work.[4] The Congress has sought in the Age Discrimination in Employment Act of 1967 to end "the setting of arbitrary age limits regardless of potential for job performance" and to require the performance capability of aging citizens to be determined individually. Title 29, U.S.C. §621(a)(2).[5]

In this case[6] the question under the Equal Protection Clause is whether all state policemen, not yet aged fifty, may be provided individual determination of their capability to perform the job while all aging fifty are conclusively presumed incapable and summarily dismissed from the job. Massachusetts is blatant about the conclusive and irrebuttable relationship it assumes between aging fifty and incompetence to perform the job of state policeman. The Massachusetts statutory provision assumes the equation:

4. L. Cain, *The Growing Importance of Legal Age In Determining the Status of the Elderly*, 4 (1972); Donahue, Orbach & Pollack, *Retirement: The Emerging Social Pattern*, in Handbook of Social Gerontology 330, 334-36 (C. Tibbetts ed. 1960); M. Barron, *The Aging American* 25-26 (1961).

5. The Legislative History is express that individual determinations are required. *E.g.*, H. Rep. No. 805, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Adm. News 2220 recites "The case-by-case basis should serve as the underlying rule in the administration of the legislation." On the Act itself and on Congressional recognition of the stereotypic myths surrounding aging and employment, see Comment, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 So. Cal. L.Rev. 1311 (1974).

6. This case arose before Congress acted in 1974 to extend the coverage of the Age Discrimination in Employment Act to include state and local government employees. 29 U.S.C.A. §630 (1975), as amended by P.L. 93-259, April 8, 1974, 88 Stat. 74.

"Retirement upon Attaining the Age Fifty-five or Expiration of Twenty Years of Service *for Physical or Mental Infirmity*." Massachusetts General Law, Ch. 32, §26(3) (Michie 1973) (Emphasis supplied). Measured against the individualized means otherwise chosen by Massachusetts to protect its interest in competent state police and scrutinized even for minimum rationality, a conclusive presumption tied to age fifty is supererogatory and invidious.

A. There Is No Reasonable Relationship Between Aging Fifty Years and Performance Capability as a State Policeman.

In *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) and, most recently, in *Stanton v. Stanton*, 95 S.Ct. 1373, 1377 (1975), the Court has written:

> A classification must be reasonable, not arbitrary, must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Age has no meaningful general relation to competence and, as the record in the lower court and the court's findings indicate, age fifty even more clearly has no relation to performance as a state policeman.

It is true, as the lower court and plaintiffs' experts themselves suggested, that "there is a general relationship between advancing age and decreasing physical ability." (Op. 755) But just as "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter", *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 645-46, so is the ability of any person at any given age to do a particular job. Research in industrial gerontology establishes that there is more variation in the ability of workers in the same

age group than there is between ages.[7] The lower court found the evidence here clear and undisputed: "the relation between chronological age and functional age varies greatly from one individual to the next." (Op. 755) The point is not, as the Brief for Appellants argues at p. 48, that "determination of an age [for mandatory retirement] involves difficult judgments about the relationship between aging and physical and psychological capacity;" such judgments are indeed difficult and, amici would suggest, even impossible. The point is that such judgments are immaterial, so far as protecting Massachusetts' interest in a competent police force is concerned. To the individually-applied medical and psychological criteria which are invoked otherwise to secure the competent performance of the Massachusetts state police, the specification of age fifty as such adds no useful information. Massachusetts' sudden presumption at age fifty is "neither necessarily nor universally true", *LaFleur*, at 644, and is undisputedly false in the case of plaintiff. (Op. 754) Considering the context in which the presumption appears—Massachusetts' system of individualized judgments of competence—it is useless to the state's purpose,[8] and even dysfunctional.

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7. See, *e.g.*, I.M. Riley and A. Foner, *Aging and Society* 426-29, 1968); U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 1223 at 1 (1968); Mark, *The Older Worker: Measurement of Job Performance and Age*, 79 Monthly Lab. Rev. 1410, 1412-13 (1956).

8. The briefs of appellee and the other amici address the other purposes profferred by Massachusetts to sustain the age classification here in question. Each of those rationales—morale of the younger men, and the attractiveness of quick promotion—resolve finally, as the lower court found, to "age discrimination per se" (Op. 755).

Appellants' invocation of an assertedly intricately woven scheme of retirement and pension to justify classification by age 50 (Brief of Appellants at pp. 27-29) defies analysis. No purposes for the classification are specified there by appellants, apart from those noted by the District Court in its first opinion, 345 F. Supp. 1140, 1142 and found wanting in its second (Op. 754, 755). Appel-

Equal protection of the laws requires that each person be given the benefit of individual determinations of job competence, particularly where, as here, the state's task cannot be furthered by any age categorizing (indeed, it *requires* individualizing determinations); and where, as here, the state has actually adopted individualizing systems for competence determinations for all other state policemen.

B. The Particular Job Capabilities Required of a State Policeman Have No Reasonable Relationship to Aging Fifty Years.

Assessing the rationality of any asserted relation between aging and job performance capability demands attention to the capabilities required by the particular job in question, as well as to the adequacy of the age criterion as an index of competence in general and of any competence in particular. The tasks of a Massachusetts state

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Note 8—*Continued*

lants do not quite say, and in any event they could find no support in the record for such a proposition, that voiding the age fifty classification, or indeed any mandatory retirement age, would threaten the Massachusetts pension scheme with bankruptcy or even with serious readjustment. Of course there would have to be adjustments. But neither appellee nor any of the amici have suggested (compare Brief of Appellants at p. 28, n.15) that voiding mandatory retirement would result in retirement at a *lower* age, nor is it conceivable how that could be so. Nor have appellee or amici suggested that it is incumbent upon Massachusetts to increase the salaries of its older workers should mandatory retirement rules be lifted. [Appellants' projections on these two counts are, of course, contradictory, for the first (at n.15) would presumably lower aggregate pension and salary costs to the state and the second could raise them.]

Appellant offers nothing particular, beyond the miasma it apparently seeks to create, to suggest that the required adjustments would involve any greater administrative inconvenience than that found insufficient to sustain invidious classifications in *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

policeman include "restoring and maintaining order in prison and civil disorders, responding to emergencies and natural disasters, patrolling highways in marked cruisers, investigating crimes and apprehending criminals." (Appendix 54-55.) Both the lower court (Op. 754) and appellants themselves (in the Brief for the Appellants at p. 6, for example), are clear, as is the record, that these tasks require *both* physical *and psychological capabilities*. Yet in large portions of its brief, appellants emphasize only the physical capabilities required (Brief for the Appellants at pp. 9-11, the policeman's "physically stressful functions," for example) and often assert that the state's purpose in classifying at age fifty is "maintaining a physically sound police force" (Brief for the Appellants at p. 38), evoking the common stereotype linking aging and physical disability and suggesting its applicability to state policemen.

Appellants in their opening statement of facts characterize the Massachusetts State Police as a "paramilitary" operation (Brief for the Appellants at p. 6). The extensive literature on police functions establishes that such a characterization is inaccurate, reflecting an understanding of police functions themselves which is stereotyped. As one student of the police writes: "A police officer is not a soldier. But [many] people refuse to see him any other way."[9] The differences between the soldier and the policeman are wide and significant and are identified in the literature on the police function. For example, basic training seeks to instill in the private an instinctive obedience to orders, as required by military functions. A police academy seeks to teach its recruits to use their own judgment, for much of the policeman's work is alone or with a partner, and requires from each policeman an immediate evaluation of and response to particular developing situations. (Appendix 57) "The police must make important judgments about what conduct is in fact criminal; about the allocation of scarce resources; and about the

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9. J. Rubenstein, *City Police* 12-13 (1973).

gravity of each individual incident and the proper steps that should be taken", the Task Force on the Police, of the President's Crime Commission reported. "No task committed to individual judgment", the Task Force concluded, "is more complex or delicate [than a policeman's]."[10]

The capabilities required for a competent state policeman thus include the psychological as well as the physical, judgment and wisdom as well as physical endurance and agility. Those qualities of judgment may have a general relationship to aging, with experience and practice being the intervening mechanism, much like the "general" relationship between aging and physical ability. But judgment capabilities generally would *increase* with age, as physical ability generally declines, and reaching age fifty would not be a conclusive sign of disability, but a sign of capability. But, as amici here argue, reasonable judgment, and the realization of the state's purpose to maintain a competent police force, requires individual determinations of competence, undistorted by stereotype. Plaintiff in this case is admittedly capable both physically and psychologically. Where as here individual determinations of competence are provided already to all state policemen except those who have reached age fifty, equal protection requires them for all without regard to age.

C. Whether or Not Massachusetts' Fifty Year Mandatory Retirement Rule Was Constitutional When It Was Adopted in 1939, It Is Unconstitutional in 1975.

Even if a legislature might reasonably have believed in 1939 that there was a sufficient rational relation between aging fifty and capability to perform the tasks of a state

10. President's Comm'n. on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). See also James Q. Wilson, *Varieties of Police Behavior* 80-81 (1970); G. E. Berkley, *The Democratic Policeman* 53, 74 (1969); R. B. Fosdick, *European Police Systems* 229-30 (1915).

policeman to support the Massachusetts mandatory retirement rule, the facts, as well as the ability to know the facts, have so changed in thirty-six years that the rule and the presumption it embodies are now plainly arbitrary.

As then Mr. Justice Stone wrote in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . those facts have ceased to exist." Similarly, in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 1215, the Court declared that a conclusive presumption cannot constitutionally "disdain(s) present realities" relying on characteristics of the past, lest it "needlessly run(s) roughshod over important interests."

The development of the medical sciences and technology, and the increasingly wide distribution of their use and benefits in our society, and the development of the behavioral sciences have very significantly changed both the reality and our justified expectations as each affects the rationality of a supposed relation between aging and job capability. People are living significantly longer, healthier and more active lives. They have a different set of expectations of themselves and each other. While still not fully realized, the Congress has committed the Nation to a policy of full employment. Title 15, U.S.C. §§1021 *et seq*. Employment has expanded at a greater rate than the population.

Quite as important in the current matter, what we know and what is knowable, has changed as well. The study of aging has become a new science—gerontology. With it, and the developments in medical and behavioral technology, the ability to specify the parameters of competence and to identify their correlatives has increased. Massachusetts' refind processes for the individual determination of job competence demonstrate the advance in knowledge, and its applicability here, as do the contemporary facts recited elsewhere in this Brief, and in the Briefs of the parties and other amici. Given these changes,

the continued use thirty-six years later[11] of the conclusive Massachusetts presumption of disability of state policemen at age fifty is unique unto arbitrariness.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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11. The single recognition of the changing conditions in which the fifty year rule continues to exist occurred in 1955. A Special Legislative Commission reported to the Legislature in that year

> although some arguments for raising mandatory retirement above age 50 for uniformed members of Group C the state police appear to have merit, it was felt that a continuation of age 50 for the present might be justifiable. It is recommended that the retirement age be reviewed in the future. Mass.H. Doc. No. 2500 at 24 (1955).

Even with the report that the age fifty rule at best "*might* be justifiable" and in any event only "for the present", the Legislature did not act nor has it acted in the twenty years since.